JUL 29 1961

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 203

MRS. CLIFFORD RAYMOND SCHLICHTER,
Petitioner,

versus

PORT ARTHUR TOWING COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF FOR PORT ARTHUR TOWING COMPANY, RESPONDENT IN OPPOSITION.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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May It Please The Court:

I.

OPINION BELOW

The opinion below is reported as set forth on pages 19 through 31 of the petition, and printed therein as Appendix "A", reported at 288 F. 2d 801 (5th Cir. 1961).

II.

JURISDICTION

Jurisdictional requisites are correctly set forth in the petition, but respondent submits there is no basis or need for granting a Writ of Certiorari herein.

III.

STATUTES INVOLVED

The only statute involved herein is the Jones Act, 46 U.S.C. § 688.

IV.

ARGUMENT

Petitioner asserts error on the part of the Court of Appeals for the Fifth Circuit in affirming the District Court's direction of a verdict in favor of respondent on the ground that there was insufficient evidence of negligence to raise an issue for the jury. The petitioner now calls upon this Honorable Court to review the evidence for the third time.

The facts are as stated in the well reasoned opinion of Judge Brown. The petitioner's "statement", exclusive of the polemics utilized therein, is, for the most part, supported by the record. However, there is no basis in the record for the following assertions of petitioner:

(1) " * * * The testimony of Slade, who apparently has been very close to the employer and to his supervisory employees, even to the extent of accepting favors from them, was, at the very least, lacking somewhat in credibility. It was obvious at the trial that he was trying to favor the employer. At the trial he changed his testimony and testified that Schlichter was drunk." [1]

[1] Petition, p. 4.

(2) " * * * in view of the fact that Slade had actually testified at the Coroner's Inquest that Schlichter was not drunk, this being factual proof. * * * "[2]

(3) " * * * (Slade) obviously (was) catered to and befriended by the tug owner, was not telling the whole truth, particularly when it was shown that he altered his testimony, and that the facts regarding the matter could have been altered to favor the defense."[3]

Although the law is clear that unseaworthiness alone is not a sufficient predicate for liability in a death case,[4] it is apparent from the facts developed, about which there is no dispute, that petitioner introduced no evidence to support a finding of negligence or unseaworthiness.

A review of the record and a study of the petition establishes that nothing less than rank conjecture could even vaguely support a finding that there was the slightest semblance of negligence on the part of respondent.

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[2] Petition, p. 6.

By no rule of evidence can prior contradictory statements of petitioner's own witness be treated as "factual proof." *Dowell, Inc. v. Jowers*, 166 F. 2d 214 (5th Cir. 1948); *N.L.R.B. v. Quest-Shon Mack Brassiere Co., Inc.*, 185 F. 2d 285 (2nd Cir. 1950); *New York Life Ins. Co. v. Bucalis*, 94 F. 2d 200 (5th Cir. 1938); III Wigmore, *Evidence* § 1018, p. 688 where it is stated:

> "It is universally maintained by the courts that Prior Self-Contradictions are not to be treated as having any *substantive* or *independent testimonial value*."

[3] Petition, p. 7.

[4] There is no cause of action for wrongful death under the General Maritime Law, regardless of whether the death is caused by negligence or unseaworthiness. *The Harrisburg v. Rickards*, 119 U.S. 199 (1886); *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921); *M/V Tungas v. Skovgaard*, 358 U.S. 588 (1959). Petitioner is therefore strictly limited to the statutory remedy given to her. Since it is alleged that the decedent was a *seaman*, petitioner's statutory remedy is limited to the Jones Act. Under that act, the petitioner must show negligence in order to recover for wrongful death, and cannot rely on unseaworthiness under the General Maritime Law. *Turcich v. Liberty Corp.*, 119 F. Supp. 7 (E.D. Penn. 1954), *aff'd*, 217 F. 2d 495 (3rd Cir. 1954); *Landy v. United States*, 101 F. Supp. 486 (E.D. Penn. 1951), *aff'd* 197 F. 2d 524 (3rd Cir. 1952).

Since the petitioner's action is within the scope of the Jones Act, this Court will not be concerned with an application of the Louisiana Death Statute. See *Lindgren v. United States*, 281 U.S. 38 (1930).

In order for petitioner to come within the scope of the cases cited on page 15 of the petition, evidence, if it were available, could have been introduced to establish (1) the existence of skid marks; (2) that Slade heard Schlichter bump or rattle the chain guard; (3) that respondent caused the decedent's inebriation; (4) that any life saving equipment could have saved Schlichter; (5) that anything, negligent or otherwise, which respondent did, was a proximate cause of the accident, or that there was any other basis for reasonable men to believe that respondent was negligent. No such evidence was presented, and presumably it could not be. We submit that the absence of such evidence is no justification for the substitution of the speculation which petitioner suggests. True, a jury conceivably could have found that respondent was negligent merely because it owned a tugboat, or permitted an intoxicated person aboard, but no finding of negligence could "reasonably" have been made.

The Appellate Court's legal conclusions fairly and accurately summarize the applicable law.[5] If this were not a proper case for the Court's exercise of the direction of a verdict, the rule allowing the trial court so to do will be rendered ineffectual.

V.

CONCLUSION

In conclusion, respondent submits that this case was decided fairly and equitably on its own facts in the Courts below; that the decision of the Court of Appeals for the Fifth Circuit does not conflict with any decisions of any other Courts of Appeals or conflict with any decisions of this Court; that the Courts below have not decided any important question of federal law which

[5] Petition, Pp. 23-31.

should be settled by this Court and that, accordingly, there is no basis or need for granting a Writ of Certiorari.

Respectfully submitted,

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